No. 8450

In the

Circuit Court of Appeals

of the

United States of America

in and for the

Ninth Circuit

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administratrix of the Estate of Lorenzo N. Winslow, Deceased,

Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

PETITION FOR REHEARING

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Appellant respectfully petitions the Court herein to grant a Rehearing on said appeal herein, and in support thereof, submits the following:

I. CERTAIN STATEMENTS OF MATERIAL FACTS INVOLVED, AS SET FORTH IN THE DE-

CISION ON APPEAL HEREIN, ARE ERRONEOUS, NAMELY:

1. That "no policy was issued."

It was admitted by witness Gerald W. Murray, Cashier for defendant, that the words and figures of the Home Office record on this application was as follows: "Date of Issue Dec. 21, 1934". See lower half of second page of application attached as Exhibit 2. Said witness stated with reference thereto: "I don't know whether that means whether policy was issued on that date or not".

For purposes of appellee's motion for a directed verdict every inference favorable to plaintiff must be indulged in.

2. That "Moore had no authority to make any contact for or on behalf of appellee."

Said witness Murray testified:

"Q. Do you know that your agents do tell prospective insured's that as a part of their statement to the insured that 'this policy can be made effective immediately'?

A. Yes, they can tell them that.

Q. And there are instances where the insured himself has desired that particular form of policy?

A. Yes, sir.

Q. Is that not true?

A. Yes, sir.

Q. So that you then leave it to your agent to accept the premium and issue the receipt?

A. Yes, sir." (Trans. pages 53, 54. Underscoring ours.)

Agent Moore testified that appellee had previously recognized the procedure followed in the instant case so as to make the insurance effective immediately; that it was his practice in similar cases where the insured applied for and it was agreed to have the insurance effective immediately, to issue the form of receipt that he issued in this instance; (Trans. p. 68); that he did not have the printed form of receipt referred to in paragraph 14, but the office has accepted his receipt on that order and noted in blank 14 the cash had been paid (Trans. p. 68); but the Company had accepted many receipts of the kind issued to Winslow, even though their instructions were different (Trans. p. 68-69); that it was his understanding of the attitude and policy of the company as he has conducted the business for years, that if the risk was the right kind and the medical was passed, the policy would be made effective immediately, even though the applicant died before the policy was issued (Trans. p. 70-71); that if the person paid a certain sum and agreed to pay the balance in sixty days the Company would honor that (Trans. p. 72); that the note or sixty day credit was considered cash (Trans. p. 78); that similarly had he taken a promissory note for the first premium payment it would have been effective immediately; that a note or credit of sixty days is considered cash (Trans. p. 78); that he has taken notes, or paid the premium himself that his closing date with the Company is the 25th day of the month; this application was written on the 14th and it was his intention to pay it on the 25th (Trans. p. 79). This would come under Moore's ordinary business relationship or course of busi-

ness with the Company. (Trans. p. 80). That it was his custom to make his cash settlements with the San Francisco office of the Company on the 25th of each month (Trans. p. 81), and at that time he intended to advance for the insured the balance of premium due over the $100.00 he had collected and sent in; that such basis of settlement was considered by the Company as equivalent to cash and policies had been issued on that basis (Trans. p. 80, 81, 82).

3. That "Appellee never approved Winslow's application, in his lifetime, or at all."

See testimony referred to, (Trans. pages 58-62) wherein it is admitted that the application was accepted, notations made thereon as to effective date of policy, various benefits allowed, including certain retroactive features, with the final statement by the Cashier that the Medical Department of the Home Office approved the application December 20, 1934.

II. THE DECISION OF THE COURT HEREIN MAKES NO REFERENCE TO AND APPARENTLY FAILS TO CONSIDER THE FOLLOWING MATERIAL MATTERS:

1. That direct issue was raised by appellants pleadings as to the:

   a. Negligence, inadvertance and imposition of agent with reference to filling in the application, particularly paragraph 14.

   b. The high pressure salesmanship and "rush-act" practiced by the agent upon the ap-

plicant—namely not allowing applicant to read the application and sending it to the San Francisco office without applicant's signature. (Trans. p. 45-46).

2. That notwithstanding Moore's method of transacting business for years, the appellee aproved and recognized same and never involved the threatened penalty of discharge in the event the Company rules applicable thereto were violated (Trans. p. 63 and 29).

III. THE DECISION OF THE COURT HEREIN FAILS TO DISTINGUISH THE CASES CITED THEREIN FROM THE FACTS AND ISSUES RAISED IN THE INSTANT CASE. THUS, IT IS STATED:

a. "The suggestion that Winslow did not read the application cannot be entertained. It was his duty to read it, and he is presumed to have done so. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 529."

But, in the citation quoted, at page 937, the Court states:

> "There was no evidence that the application was not read by the assured before he signed it, or that there was any imposition practiced upon him, or that after receiving the policy he applied to correct his answers, which as written down, were conceded to be false."

b. "If, despite his lack of authority, Moore attempted to make such a contract, appellee was not and is not bound thereby. Bankers Reserve Life Co. v. Yelland (CCA 9), 41 F. (2d) 684, 686; Braman v. Mutual Life Ins. Co. (CCA 8), 73 F. (2d) 391, 393; Toth v. Mutual Life Ins. Co. 123 Cal. App. 185, 192, 11 P. (2d) 94, 96."

The decisions thus cited are to be distinguished from the instant case on the facts.

(1) Thus, in Braman v. Mutual Life Ins. Co. 73 Fed. 2d 391, the Court at 397, in considering the identical form of application states:

> "This is an action at law upon this contract, and not a suit to reform the instrument, nor is there any claim of fraud or misrepresentation. In this suit the instrument must be accepted as the contract of the parties."

(2) In Toth v. Mutual Life Ins. Co. 123 Cal. App. 185, 192, 11 P. (2d) 94, 96, it was declared that "plaintiff offered no evidence what authority was vested in Thomas" (the agent).

In the instant case plaintiff made proof through Murray and Moore as to authority and practice of Moore as such agent. Furthermore, the pleadings herein directly raised the issue of imposition and negligence of the agent Moore.

(3) In Bankers Reserve Life Co. v. Yelland, 41 Fed. (2d) 684, we find the case distinguishable upon the facts and the issues raised in the pleadings. Therein there was no contention of fraud or mistake, and where it appeared that the entire contract was contained in the application, and no issue raised as to the failure to read the same, by reason of the imposition of the agent, the Court held that such application contained the entire contract.

(4) The case of Vierra v. New York Life Ins. Co. 119 C. A. 352, is directly in point as to facts and issues raised and upheld recovery against the Company.

(c) The statement in the decision herein:

"Furthermore, such a receipt, if issued, would not have made the proposed policy effective, unless the application had been, in Winslow's lifetime, approved by appellee. Braman v. Mutual Life Ins. Co., supra, p. 397."

is contrary to the meaning and purpose of immediately effective insurance and the Courts should not by decision defeat or subvert the intent and agreement of the parties.

See also testimony of Moore, Trans. pages 70-71.

There is no law preventing an insurance company making a contract with an insured that the same may be

effective immediately. The Cashier (Murray) and the agent (Moore) so testified. There is no provision in the application itself placing or justifying the limitation as to such insurance becoming effective only if approved by the company during the lifetime of the insured. When it appears from the evidence (as is the case herein) that every department of defendant including the Medical, approved the application, the Court's decision herein as to such point is entirely without support, and in fact, against the uncontradicted evidence.

In cases of applications and agreements for insurance coverage effective immediately, the death of the applicant before the policy in fact may have issued does not relieve the Company of liability.

Marderosian v. National Casualty Co., 96 Cal. App. 295, 303. 273 Pac. 1093.

Cordway v. People's Mutual Life Ins. Co., 118 Cal. App. 530, 533. 5 Pac. (2nd) 453.

Meyer v. Johnson, 7 Cal. App. 2nd, 604, 618; 46 Pac. (2nd) 822. See also note 81 A. L. R. 332 at 336.

IV. The decision of the Court herein fails to recognize or consider the law applicable to this case as declared by the United States Supreme Court in UNION MUTUAL LIFE INS. CO. v. WILKINSON, 13 Wall. 222, 20 L. Ed. 617; relating to the negligence, mistake and fraud of agents, and in decisions cited in appellant's Brief approving same.

CONCLUSION.

To sum up:

We have a case (1) where the Jury rendered a verdict not as its own verdict, but simply because it was so instructed (Trans. 87); and (2) where this Court has apparently arrived at erroneous conclusions as to most important and material facts as hereinbefore noted, and has apparently failed to consider other material facts and issues material to a just and proper decision herein. The cases cited in support of its decision are distinguishable on the facts from the instant case. The decision rendered is not supported by the law cited therein; and the result shocks the senses as to what is administration of justice and fair dealing. In fact the greatest injustice is done and a premium is placed upon the inadvertance, admitted negligence, mistake or fraud of the insurance company's representatives. Where the agent has authority to enter into the contract agreed upon, any failure on his part to pursue the method prescribed should rest upon the insurer rather than the insured.

At the time calendared for argument, request was made for continuance and opportunity for oral argument because of illness of appellant's counsel, and it is urged that further opportunity for oral argument and full consideration of the case in view of the foregoing points, will compel a reversal.

Respectfully submitted,

N. C. Nelson

Attorney for Appellants.

CERTIFICATE OF COUNSEL.

I, H. C. Nelson, hereby certify that I have been counsel for Appellants at the times during the pendency of the within litigation since the filing of the original complaint therein to date; that in my judgment the Petiton for Rehearing herein is well founded and that it is not interposed for delay.

H. C. Nelson

Attorney for Appellants.